HAJI ABDUL GHANI BIN ISHAK v. PUBLIC PROSECUTOR

[O.Cr.J. (Wan Yahya J.) May 14, 1979]

[Malacca — Criminal Application No. 1 of 1979]

Criminal Law and Procedure — Application for copies of Statements — Statements made by accused and co-accused — Opportunity to inspect and make copies of documents seized — Evidence Act, 1950, ss. 74 & 76 — Criminal Procedure Code, (F.M.S. Cap. 6), ss. 51 & 112.

In this case the applicant had been charged with the offence of committing corrupt practices and an application was made that the Public Prosecutor (i) furnish him with copies of statements made by him whether cautioned or uncautioned; (ii) furnish him with copies of similar statements made by his co-accused and (iii) offer him the opportunity to inspect and make photostat copies of the documents seized by the B.S.N. in connection with the trial.

Held: (1) as the statements made by the applicant, whether cautioned or uncautioned, were public documents and the applicant had a tangible interest in them, the applicant was entitled to be supplied with copies of the documents;

(2) the applicant was not entitled to copies of the statements by his co-accused, as the co-accused was a competent witness against him. However, he might by a similar application obtain them for his own defence;

(3) the applicant was entitled to inspect the documents seized by the B.S.N. and to make copies of them.

Cases referred to:-

(1) *Mahadeo* v. *Rex* [1936] 2 All E.R. 813.

(2) *Anthony Gomez* v. *Ketua Polis Daerah, Kuantan* [1977] 2 M.L.J. 24.

(3) *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur* [1979] 2 M.L.J. 49.

(4) *Public Prosecutor* v. *Teoh Choon Teck* [1963] M.L.J. 34.

CRIMINAL APPLICATION.

Edgar Joseph Jr. for the applicant.

Faidz bin Mohamad Darus (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Wan Yahya J.: The 1st Accused is charged with:—

"That you on October 2, 1974, in the State Executive Council, Malacca, in the District of Melaka Tengah, in the State of Melaka, being a member of the Administration, to wit, a member of the State Executive Council, Melaka, committed corrupt practices in that you, while being such member of administration, participated in deliberating for approving 200 acres of State Land Q.T. 561 in the Mukim of Kuala Linggi, Alor Gajah, Melaka, submitted in the name of Kipah binti Othman by one Md. Nor bin Baba on March 2, 1974, of which you were interested in that the land so approved was applied by you by using the name of the said Kipah binti Othman, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970."

By a notice of motion dated April 10, 1979 he made an application for an order that the Public Prosecutor:

(i) furnish him with copies of statements made by him, whether cautioned or uncautioned;

(ii) furnish him with copies of similar statements made by his co-accused; and

(iii) offer him the opportunity to inspect and make photostat copies of the documents seized by the B.S.N. in connection with these trials.

From his supporting affidavit and the annexure it is apparent that a request to that effect has been made to and denied by the Public Prosecutor.

As the grounds of this application suggest that the denial of reasonable opportunity of studying the statements asked for will preclude the accused from instructing his counsel properly and hamper him from preparing an adequate defence, I think it is most opportune that I should rule on the orders prayed for prior to the commencement of his trial proper.

At the previous hearing before me on May 2, 1979 Mr. Edgar Joseph Jr., counsel for the applicant, argued that the applicant in this case had a tangible interest and not just a mere curiosity in the statements. He submitted that the applicant was entitled to the benefit of the production of such statements as found in the decision of the Privy Council in *Mahadeo* v. *Rex*.[1] In respect of the application for the first two categories (i) and (ii) above, he relied on the Federal Court case of *Anthony Gomez* v. *Ketua Polis Daerah, Kuantan*[2] and the judgment of Suffian L.P. in the case of *Khoo Siew Bee & Anor.* v. *Ketua Polis, Kuala Lumpur*.[3] In particular counsel relied on several passages of the Lord President's judgment (sitting as a High Court judge) which dealt with various conflicting Indian authorities, which run across nearly two typewritten pages and which ended in the following pertinent paragraph:

"The principle decided in *Krishnan* A.I.R. 1961 Madras 92 was followed by the Federal Court in *Anthony Gomez* v. *Ketua Polis Daerah Kuantan* in regard to a First Information Report lodged by a complainant against an accused, and, with respect, I would hold that it should also be followed in regard to a Cautioned Statement recorded from an accused person, so that he has an interest in it, has the right to inspect it and to a certified copy before the commencement of the trial especially as here the accused have been brought to court and charged. Accordingly there shall be an order in terms of the motion that the respondent supply the applicants a certified copy of the cautioned statement made by each of them to the police under section 113 of the Criminal Procedure Code on payment of such fees as may be payable."

Counsel further argued that there was no difference between a cautioned and uncautioned statement and the principle would be equally applicable. He was of the view that the term 'cautioned statement' used in that paragraph was incidental.

Encik Faidz however argued that the principle could only be applied to cautioned and not to uncautioned statements. He stressed that as the statements were made under different sections of the Criminal Procedure Code, they possess different characters and effects and therefore could not be taken to mean the same in the judgment.

Now *Mahadeo's* case concerns, *inter alia*, the refusal by the Attorney-General in Fiji to produce statements made by a person who had been charged as an accessory after the fact to murder with the applicant in the Fijian Supreme Court. Apparently two statements were made by the person, one of which was made to the District Commissioner while in custody. There is nothing in the judgment to indicate whether statements made were confessions or not or whether they are similar to sections 112 and 113 of our Criminal Procedure Code. I agree with the submission of Encik Faidz that in the absence of a suggestion that our laws in the matter are *in pari materia* with the Fijian law,

it is unsafe to rely on that judgment. I am aware that age does not erode a good judgment but before I can accept this 43 year old case I have to be convinced that the laws referred to in Fiji in 1936 are identical to our Criminal Procedure Code in 1978/79.

That leaves me with two local authorities to decide on. Of the two, *Anthony Gomez's* case specifically dealt with first information report made to the police and so it remains to be seen whether the dicta of Suffian L.P. is applicable not only to both cautioned and uncautioned statements but also to statements made by others such as a co-accused.

An application like the present one for the prosecution to furnish copies of statements can only succeed on the applicant's satisfying the court first that (a) the document sought for is a public document as defined under section 74 of the Evidence Act and (b) the applicant has tangible interest in the document as required by section 76 of the same Act. There is no doubt that the documents were recorded by a public officer, who was under a duty to record them and therefore they would, to my mind, fall under the definition of a public document. As for the element of interest, such an element was considered to be sufficient in respect of a first information report. That element of interest was extended in *Khoo Siew Bee's* case to cautioned statements and, in my considered opinion, to uncautioned statements as well. For the purposes of section 76 of the Evidence Act I can see no distinction between the two. The applicant is the author of either statement and if it has been held that he possessed a tangible interest in statements in which he had been cautioned, I do not see any reason why that interest should diminish if he has not been cautioned.

I find support in this regard from the last but one paragraph of *Khoo Siew Bee's* case in which the learned Lord President said:

"I do not think that my ruling is unfair. The cautioned statements have been made by the accused themselves (not by others implicating the accused), and so there is no fear of the accused tampering with potential witnesses who have given information against them. Also, the statements have been signed by the accused (section 112(v), Criminal Procedure Code,) and so it will be difficult for them to depart radically from what has been recorded."

In that paragraph the Lord President summed up why he thought his ruling was not unfair to the prosecution. Firstly he said that because the statement was made by the accused himself, there was no fear of his tampering with witnesses as could likely happen if the statement was by another witness. Secondly, as the statement has been signed by the accused under section 112 (v) of the Criminal Procedure Code, he could not radically depart from its contents. I am of the view that an uncautioned statement by the applicant in this case would lead to an identical conclusion. The decision, be it in the form of *obiter dicta*, is none the less persuasive.

At the last paragraph of the statement the Lord President concluded with the words:

"Be it noted that my ruling only applies to statements recorded from the accused...."

I am convinced that the judgment was intended to include all statements, whether cautioned or uncautioned, made by the accused.

On the second category of statements applied for by the applicant, however, I hold that they need not be produced. In the same paragraph last quoted above the learned Lord President continued:

"...not from others who are potential witnesses against or for them — as to which the prosecution is under no duty to supply to the defence, *Bryant and Dickson* (1946) 31 C.A.R. 146."

In that case the Director of Public Prosecutions refused to supply a copy of the statement which the prosecution had recorded from a witness whom they had made available to the defence. Lord Goddard, *inter alia*, opined:

"... Is there a duty in such circumstances on the prosecution to supply a copy of the statement which they have taken to the defence? In the opinion of the court there is no such duty, nor has there been... In the opinion of the court it is quite wrong to say that it was the duty of the prosecution in these circumstances, having made Campbell available to the defence as a witness if they wished to call him, to go further and produce the statement which he had made."

Now the co-accused in this case is also a competent witness against the applicant. Whatever statement recorded from the co-accused is a statement made by a witness. The principle in the above case as applied in *Khoo Siew Bee's* case shall apply and the prosecution is relieved from the duty to supply such statement.

As regards the last category of document applied, i.e. documents seized by the B.S.N. in respect of this case, the application is made pursuant to section 51 of the Criminal Procedure Code. The section empowers the court to order the production of documents for the inspection of the opposite party if the court considers such production is necessary or relevant for the purposes of the trial. These documents were seized in the course of the investigation of the case against the applicant and it was submitted to me that they are very relevant to the applicant in preparing his defence. The voluminous documents have been particularly described in the search lists issued by the B.S.N. and counsel limits his right of inspection to those on that list only. In *Public Prosecutor* v. *Teoh Choon Teck*[4] Hepworth J. laid down the test for ascertaining what is necessary or relevant for the purpose of the trial as follows:

"The thing called for must have some relation to, or connection with, the subject-matter of the investigation or inquiry or throw some light on the proceeding, or supply some link in the chain of evidence. Anything which may reasonably be regarded as forming part of the evidence in the case may be ordered to be produced, and that is the primary object of these provisions. (*Mallal's* Criminal Procedure, 3rd edition, page 69). It is not a question at that stage of whether the document is admissible or not. It may be that the thing called for may turn out to be wholly irrelevant to the inquiry, but so long as it is considered to be necessary or desirable for the purpose of the inquiry, the power is there. (*Sohoni's* Code of Criminal Procedure, 15th edition, Volume 1, page 239). The important thing is that at the time it appears to be relevant to the investigation, inquiry, trial or other proceeding."

I see no reason to disagree with His Lordship's sound guidelines.

It was argued by Encik Faidz that the judgment of Hepworth J. restricted the applicant to viewing the document only and not to supply certified copies

thereof. I agree with his assertion but wish to add that, although section 51 of the Criminal Procedure Code does not place the obligation on the police as in section 76 of the Evidence Act to supply certified copies of the document sought for, the section clearly did not prohibit the applicant from making copies of them himself.

There shall be order in terms of the application in respect of the statements, cautioned or uncautioned, made by the applicant and the documents seized by the B.S.N.

The application for statements of co-accused is refused. However, he may, by a similar application, obtain them for his own defence.

In conclusion I wish to express that a remarkably higher standard of justice would have been achieved if the parties adopt a more liberal approach towards applications of this kind. Documents produced unexpectedly in court can only result in adjournment and delay in the disposal of a case. An attitude of undue caution in the production of documents necessary for the defence of an accused person may unfairly give rise to the insinuation that the prosecution is resorting to a hide and seek method or reducing the defence into a game of blind man's buff.

Order accordingly.

Solicitors: *Joseph & Son.*

SEKONG RUBBER CO. LTD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Salleh Abas F.J.) November 3, 1979]

[Kuala Lumpur — Tax Appeal No. 1 of 1979]

Revenue Law — Sale of timber growing on estate belonging to company — Company having powers to carry on business of rubber planters and timber merchants and dealers — Whether income received from sale income in respect of gains or profits from a business — Whether capital or revenue receipts — Income Tax Act, 1967.

In this case the appellants were a company which had powers under their memorandum and articles of association to carry on, among other things, the business of rubber planters as well as that of timber merchants and dealers. They acquired land for the propose of planting rubber but after planting a small portion of the land with rubber, in 1930 they ceased to be rubber planters and the estate was closed down, so that the planted areas reverted to jungle land. In 1971 the company entered into an agreement with another company whereby the trees on a specified area of the land were sold for $420,000. The purchasers were given rights to fell and remove the timber from the said area and it was stated that the logging operations should be completed on or before July 31, 1974. The appellants were assessed to income tax on the sum of $420,000 and on appeal the Special Commissioners confirmed the assessment, holding that the sale of the timber was an adventure in the nature of trade. The appellants appealed.

Held: (1) the principle is that in the case of a company incorporated for the purpose of making profits for its shareholders, any gainful use to which it puts any of its assets *prima facie* amounts to a carrying on of a business;

(2) in this case having regard to the appellant's memorandum and articles of association and to what they did from the moment they acquired the estate to the time when they sold the standing timber on their estate, their activities could be said to be leading to the maturing of the asset and the sale must be an adventure in the nature of trade and once the transaction has the badge of trade, the fact that it is an isolated transaction does not prevent the transaction from being in truth an adventure in the nature of trade;

(3) since only the timber was sold and not the land, and as the sale was such that the timber had to be cut immediately, the finding of the Special Commissioners was therefore correct. The timber sold were not capital assets and the receipts were not capital receipts but revenue receipts subject to tax.

Cases referred to:-

(1) *American Leaf Blending Sendirian Berhad* v. *Director General of Inland Revenue* [1979] 1 M.L.J. 1; [1978] 3 All E.R. 1185.

(2) *International Investment Limited* v. *Comptroller-General of Inland Revenue* [1979] 1 M.L.J. 4.

(3) *J.P. Harrison (Watford) Limited* v. *Griffiths* (1962) 40 T.C. 281, 303.

(4) *Edwards* v. *Bairstow* (1955) 36 T.C. 207, 230.

(5) *St. Aubyn Estate Ltd.* v. *Strick* (1932) 17 T.C. 412.

(6) *Kauri Timber Company Limited* v. *Commissioner of Taxes* [1913] A.C. 771.

(7) *Hood Barrs* v. *Commissioners of Inland Revenue* (1955) 37 T.C. 188.

(8) *Murray* v. *Commissioners of Inland Revenue* (1951) 32 T.C. 238.

(9) *Hopwood* v. *Spencer* (1964) 42 T.C. 169.

(10) *Thomson* v. *Deputy Federal Commissioner of Taxation* (1929) 43 C.L.R. 360.

(11) *Hudson's Bay Company Limited* v. *Stevens* (1909) 5 T.C. 424.

(12) *Taylor* v. *Good* (1973) 49 T.C. 277.

(13) *Commissioners of Inland Revenue* v. *Pilcher* (1949) 31 T.C. 314, 335-336.

TAX APPEAL.

J.J. Puthucheary for the appellants.

Jaafar bin Mat Saman (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J.: The question to be determined in this case is whether the sum of $420,000 received by the appellants from the sale of the timber growing on their estate is "income in respect of gains or profits from a business" within the meaning of the Income Tax Act (Revised 1971). The answer to this question in turn depends upon whether the transaction by which the appellants sold the timber and thus received the said sum is a business transaction or one which can be regarded as any part of an adventure in the nature of trade. The Special Commissioners found that the transaction is an adventure in the nature of trade and so confirmed the assessment.

The appellants are a company incorporated in 1908 under the U.K. Company Legislation, i.e. the Companies Acts 1862 to 1900. They have powers under their Memorandum and Articles of Association to carry on, among other things, the business of rubber planters as well as that of timber merchants and dealers. They acquired the property, i.e. the estate, only two months after their incorporation undoubtedly for the purpose of planting rubber; but after planting a small portion of the estate with rubber, in 1930 they ceased to be rubber planters and the estate was closed down and so the planted areas reverted to jungle land. No reason was proffered by the appellants as to why they ceased planting rubber on the estate. However, the Special Commissioners attributed the cessation to the fact that having regard to the low price of rubber